86 1751

No.

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1986

Elliott F. Rhodes, Petitioner

v.

Dekalb County et al., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Elliott F. Rhodes

PRO SE

3835 Flat Shoals Rd.

Decatur, GA. 30034

(404) 241-9939

Questions To Be Presented For Review

1. Were appellant's procedural due process rights guaranteed by the Fourteenth Amendment to the U.S. Constitution violated when the Respondent did not afford him an opportunity for a hearing or review on two separate suspensions without pay?

2. Was appellant's constitutional right of access to the courts guaranteed by the Due Process and Equal Protection clause of the Fifth Amendment violated when the Eleventh Circuit Court of Appeals refused to review the Title VII claim because appellant was unable to afford the cost of the transcript of the

evidence which was necessary for review on appeal?

3. Did the District Court err in dismissing appellants non-Title VII claims (42 U.S.C. sections 1981,1983,1985) when it applied the 12 months and 2 year statutes (O.C.G.A. sections 36-11-1 and 9-3-33) as opposed to the 20/2 year statute codified at O.C.G.A. section 9-3-22?

4. Should the District Court have applied the Doctrine of Equitable Tolling when appellant was a member of a pending class-action, thus making all non-Title VII claims timely filed?

5. Did the District Court err in

dismissing appellant's Title VII claim for failure to establish a prima facie case?

Parties to the Proceedings

1. Elliott F. Rhodes, former Police Officer, Dekalb County Appellant Petitioner
2. Dekalb County, Georgia- Appellee
3. Georgia Department of Public Safety, Appellee Bureau of Police Services
4. Captain E.E. McCart- Appellee
5. Dekalb County Merit System- Appellee
6. Genet McIntosh, Attorney for Appellees
7. Albert Sidney Johnson, Attorney for Appellees
8. Judge Robert L. Vining,Jr. U.S. District Court Judge

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TABLE OF AUTHORITIES

Statutes and Rules

The statutes and code sections below are set out verbatim in Appendix I pursuant to Supreme Court Rule 21(f).

Jurisdiction of Supreme Court

The judgement of the Court of Appeals for the Eleventh Circuit was made and entered on November 19, 1986. Subsequently, the Court of Appeals denied the Petition for Rehearing and Rehearing EN BANC on January 30, 1987. Jurisdiction of the Supreme Court is invoked under 28 U.S.C. sections 2102(c) and 1254(1).

Basis For Federal Jurisdiction Below

The District Court possesses jurisdiction over this matter pursuant to 28 U.S.C. section 1331 since this case involves federal questions.

The Court of Appeals for the Eleventh Circuit has jurisdiction over this matter pursuant to 28 U.S.C. 1291 since the District Court's orders of Jan. 7, 1985 constitute "final decisions".

Opinions Below

The opinion of the District Court and Court of Appeals (Appdx 2) is not reported.

Reasons for Granting Writ of Cert

This case raises important questions of federal law. The first issue concerns whether a civil plaintiff has a constitutional right of obtaining a transcript of evidence at governmental expense when he has been denied in forma pauperis status on appeal and is still unable to afford the costs when such transcript is necessary for review by the Court of Appeals. The Supreme Court has decided such an issue in the case of Griffin v. Illinois, however that case and those following Griffin have all involved criminal defendants, not a civil plaintiff. Since the Supreme Court has not decided upon this issue it is ripe for review.

The second issue involves a

conflict in federal policy with regards to when a federal court is faced with the problem of applying the Doctrine of Equitable Tolling to suspend statutes of limitations in employment discrimination actions filed under 42 U.S.C. 1981 et seq and 42 U.S.C.2000(e) et seq.

Here, appellant was a certified member of a class action in Winkler v. Dekalb County, 648 F.2d.411 (5th cir. 1981). Appellant relies on the equitable tolling rules set forth in American Pipe and Construction Company et al v. State of Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974) and Crown,Cork and Seal Company, Inc. v. Parker, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed. 2d 628 (1983). In both cases, the Supreme Court applied the equitable tolling

doctrine to suspend the running of the period of limitations when the appellants were members of pending class actions. The court reasoned that unless the filing of a class action tolled the statute of limitations, potential class members would be induced to file separate lawsuits, thus circumventing the policy of avoiding the multiplicity of lawsuits.

On the other hand, the Court in Johnson v. Railway Express Agency Inc., 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) refused to toll the running of the period of statute of limitations. The issue in Johnson was whether the timely filing of a charge of employment discrimination with the EEOC pursuant to section 706 of Title VII of the Civil Rights Act

of 1964, 42 U.S.C. 2000(e)-5, tolls th running of the period of limitations applicable to an action based on the same facts instituted under 42 U.S.C. section 1981. The Court in refusing to suspend or toll the period of limitations reasoned that the remedies available under Title VII and under section 1981, although related, and directed to most of the same ends, are separate, distinct, and independent.

In the interest of uniformity, the Supreme Court needs to decide this issue because the federal court cases as well as the Supreme Court cases in this area are in conflict. The federal policy of conciliation and avoiding multiplicity of lawsuits is consistent throughout the cases, however the federal decisions

construing the policy are inconsistent.

STATEMENT OF THE CASE
STATEMENT OF FACTS

Appellant, Elliott F. Rhodes, a black male formerly employed as a police officer in the Dekalb County Police Department, brought this action pursuant to 42 U.S.C. sections 1981, 1983, 1985, and 2000(e) et seq. (The Civil Rights Act of 1964, as amended) as well as the state and local Fiscal Assistance Act of 1972 (31 U.S.C. sections 1242, 1244, 1262).

Appellant was initially employed by Dekalb County in January of 1979 as a Police Officer 1, an entry level position for county police officers, and was immediately enrolled in the thirteenth police academy training class. During his probation and training period, he was terminated on

April 2, 1979 after he refused to voluntarily resign. Allegedly, he was terminated because he had been unable to pass the police academy's firearms test. Appellant then filed a charge of discrimination with the Equal Employment Opportunity Commission on May 3, 1979, and in an effort to resolve that charge through conciliation, the county subsequently agreed to re-employ appellant and allow him to enroll in the next police academy class (the fourteenth academy).

Appellant contends that he was discriminated against because of his race, (black), and in retaliation for having filed a previous discrimination charge with the EEOC. The evidence shows that appellant was kept under oppressive surveillance

after he was reinstated by the EEOC. Appellant was given an unsatisfactory evaluation while other officers who had not filed charges of discrimination were not similarly evaluated.

The appellant established that he met the minimum requirements for the job of Police Officer I; that he was suspended without pay for being tardy and charged with being A.W.O.L. on his first day back to work, July 24, 1979, while other employees who had not filed charges of discrimination and were tardy on more than one occasion had not been suspended. The evidence established that the stated reasons for the appellant's termination was pretextual in that the appellees retained employees who had committed

similar if not worse acts.

The appellant was hired, initially, some nine days after the thirteenth recruit class began, and was enrolled in said class on January 25, 1979. Appellant enrolled in the fourteenth recruit class after his re-instatement. The reasons stated for appellant's discharge was failure to pass the firearms exam although he had a passing score. It is interesting to note that nine weeks remained for firearms instruction, that appellant was enrolled late, and that the other recruits had considerably more practice with firearms.

A white male member of the thirteenth academy class graduated on May 18,1979; his firearms score was 68.9 which was below the passing

score (R-17). Appellant had an average score of 86.6 on March 12, 1979. He was the only black member of the fourteenth recruitment class to be terminated. Although the reasons given for his termination were, inter-alia, inefficiency in performing his duties, the evidence firmly established that Director Hand had no personal knowledge of any facts to support the conclusion of termination.

When Rhodes was re-instated after the initial EEOC proceedings, he was made by the appellees to stand out like a "sore thumb." Captain E.E. McCart took his gun away so he could not practice at the shooting range. While the other recruits went out on the street, appellant was forced to stay at the academy and

fetch doughnuts for his superiors. When he was finally permitted to go out on the street, he was not paired and evaluated by a veteran officer, as per departmental rules, but was also paired and evaluated by a rookie officer who was still under probationary training. After Rhodes was re-instated he was forced to take all of his courses over again, even the ones he had passed. The other recruits who had failed numerous tests were graduated from the academy without having to re-take any tests.

In the district court's order of January 9, 1985, the court emphasized the fact that Rhodes had not appealed to the Dekalb County Merit System, who in actuality had no authority to re-instate appellant. The court also noted that Rhodes sent a notice and

request to sue Dekalb County, Ga. to the United States Department of Justice on May 27, 1980 and did not receive permission to sue until May 18, 1983, almost three years later. On January 7, 1985 the district court granted appellees motion for summary judgement as to plaintiffs claims under the Revenue Sharing Act, and 42 U.S.C. sections 1981, 1983, and 1985 as being barred by the statute of limitations. The only claim which remained at the time of trial was plaintiffs Title VII claim against Dekalb County.

Following the close of appellants evidence after three days of hearings in a non-jury trial, the court granted appellees Rule 41(b) motion finding plaintiff had totally failed to make out a prima facie case

of discrimination or retaliation under Title VII, and dismissed the action on its merits. (R3-2). In dismissing the case, the court found appellant had offered no proof of discrimination or retaliation on the part of defendants and specifically held appellant was not qualified for the position of Police Officer I at the time of his termination. (R3-6). Plaintiff subsequently appealed this case to the United States Court of Appeals for the eleventh circuit contending that the district court erred in holding that he failed to establish a prima facie case of discrimination under Title VII. The Court of Appeals in its order of November 19, 1986 stated that appellant has failed to provide a transcript of the evidence on which

the district court made its findings. In light of this fact, the court was not able to review the discrimination claim and consequently affirmed the district court decision.

Appellant's procedural due process rights guaranteed to him by the Fourteenth Amendment to the constitution were violated when the Dekalb County Police Department did not afford him an opportunity for a hearing on two suspensions without pay and termination.

On two occasions appellant was suspended without pay for that day. He was not given the opportunity for any type of review. Dekalb County Code sections 2-3437 and 2-3438 enumerate the appeal procedures for an employee who is dismissed, suspended, or demoted. These

sections provide that a permanent employee who is dismissed, suspended or demoted shall have a right to appeal to the council not later than ten days after the effective date of the dismissal, suspension or demotion.

A case on all fours with the instant case is the fifth circuit case of Winkler v. County of Dekalb, Ga., 648 F. 2d 411 (5th cir. 1981). There the appellant, Maurice Winkler, brought a 42 U.S.C. section 1983 action, complaining that Dekalb County had demoted him from his position in its water and sewer department without due process of law. Winkler, a licensed engineer, was first hired by Dekalb County in 1974. In 1975 he was made project manager of the South River advanced

wastewater treatment project, the largest construction project ever undertaken by the county. Two years later, in 1977, Winkler was shifted to a position as an assistant in a different division of the water and sewer department. Although Winkler remained at the same salary level, his new position seems to have been created for the specific purpose of effectuating his transfer and carrying greatly reduced responsibilities. Id. at 412. As in the instant action Winkler challenged Dekalb County Code sections 2-3437 and 2-3438.

The Winkler case hinges upon the determination of whether the appellant possessed a property interest in his position. The constitution does not create property

interests. "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source, such as state law." Board of Regents v.Roth, 408 U.S. 564,577, 92 S.Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). The constitution guarantees, however, that a citizen may not be deprived of the benefits secured by these rules or understandings without due process of law: "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance which must not be arbitrarily undermined. It is the purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims." Id. at 577, 92 S.Ct.

at 2709.

In Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, at 2699 the Supreme Court states, " We have made clear in Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. at 2709, that property interests subject to procedural due process protection are not limited to a few rigid, technical forms. Rather, property denotes a broad range of interests that are secured by "existing rules or understandings." Id. at 577, 92 S.Ct. at 2709. A person's interest in a benefit is a property interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke in a hearing.

In Winkler, the Dekalb County

Code in outlining the conduct of the parties, establishes the existence of "rules or mutually explicit understandings" supporting Winkler's claim to entitlement. The Court of Appeals in Winkler held that the Dekalb County Code indicates to employees that transfers will be to a position whose duties are of the kind or quality encompassed by their classification. It establishes a reasonable expectation that an employee will not be demoted to a position of vastly diminished responsibilities without cause. This expectation is further enhanced by the provisions of the code guaranteeing a hearing in cases of demotion or prejudicial job action. In Winkler at page 414, the court further held that Winkler was

entitled to an order directing Dekalb County to provide him with a hearing comporting to the standards of due process. Such a hearing must be "meaningful", citing Matthews v. Eldridge, 424 U.S. 319,333,96 S.Ct. 893,902, 47 L.Ed.18 (1976) and must accordingly be held before a person or body empowered to render a decision.

In the instant action, appellant was not afforded the opportunity for eview of his two separate suspensions and ultimate termination as guaranteed to him by the Dekalb County Code sections. At no time during his employment with Dekalb County was he afforded the opportunity for appeal.

With regard to the federal avenues of review, appellant's right

of access to the courts guaranteed by the Due Process and Equal Protection clause of the Fifth Amendment to the U.S. Constitution was violated when the Court of Appeals refused to review the Title VII discrimination claim because appellant could not afford the cost of a transcript necessary for review on appeal.

Appellant contends that the district court erred in holding that he failed to establish a prima facie case of discrimination under Title VII. The Court of Appeals of the eleventh circuit in its decision on November 19, 1986, stated that since plaintiff has failed to provide a transcript of the evidence on which the district court made its findings, and since the court did not have a complete record of the trial

proceedings, it was unable to review the Title VII claim.

Appellant filed a motion to proceed on appeal in forma pauperis, as well as a motion for a trial transcript at government expense. The district court, in denying both of appellants motions, stated that neither in his motion to proceed in forma pauperis nor on his notice of appeal does appellant assert any basis for an appeal to be taken in this case. The court further noted that the unsigned affidavit mentioned in the motion to proceed in forma pauperis showed that the plaintiff had sufficient property and/or the capacity (as a real estate broker) to pay more than his share at his present income (the plaintiffs 1982 income tax return submitted at trial

indicated that he earned $11,500 in that year). The district court found that the appellants appeal was without merit, however in its order of December 5, 1985, the court found that the appellant's case was not so frivolous, unreasonable, or without foundation that an award of attorneys fees to the defendant would be justified. Consequently, the appellant was forced to proceed on appeal with limited funds and faced with the choice of either paying for the cost of a transcript on appeal or paying for his attorneys services to bring the appeal; he chose the former.

Even though the district court does not consider the appellant indigent, entitling him to a transcript at government expense, the

fact still remains that the appellant has to pay for a transcript (approximately $500) in order to obtain a meaningful review of his Title VII claim. As of this day, the Supreme Court has not decided a case in which a civil plaintiff was unable to afford the cost of a transcript when such transcript is necessary for review on appeal by the court. The Supreme Court has only articulated its views regarding transcripts in cases where indigent criminal defendants were unable to pay the costs of transcribing a transcript.

The requirement that an indigent defendant contemplating an appeal of his conviction of a crime be furnished at public expense with a transcript or other record of the lower court proceedings against him

where such a document is necessary for effective review of his case was set forth in the landmark case of Griffin v. Illinois, 351 US 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) In that case the Supreme Court, while noting that a state is not required by the federal constitution to provide appellate review at all, also indicated that a state that does provide appellate review must do so in a way that does not discriminate against some convicted defendants by reason of their poverty. Thus, the Supreme Court held that where two defendants convicted of armed robbery had alleged that they were poor persons with no means of paying the fees necessary to acquire a stenographic record of their trial or other court records necessary to

prosecute their appeal, the lower court's refusal to furnish such documents was a denial of their constitutional guarantees of equal protection and due process.

The Griffin Court made it clear, however, that a state is not required under the due process and equal protection clauses to purchase a stenographer's transcript in every case where a defendant cannot buy it, but may find other means of affording adequate and effective appellate review to indigent defendants. Elaborating on this point in Draper v. Washington, 372 U.S. 487, 835 S.Ct. 774, 9 L.Ed.2d 899 (1963), and quoting this language with approval in Mayer v. Chicago, 404 US 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971)., the court said that it is only

necessary that the state furnish the indigent defendant with a "record of sufficient completeness" to permit proper consideration of his claims. In light of the principals announced in Griffin v. Illinois ,supra the appellant should have been provided with an adequate substitute or at least a record of "sufficient completeness" which would allow his discrimination claim to be reviewed on appeal.

Just before the appeal was filed the court reporter took maternity leave. During the interim of consecutive absences the appellant attempted on numerous occasions to reach the court reporter, but instead reached only her telephone answering device. Finally, in the middle of May, 1986 appellant communicated with

the court reporter and was told that the transcripts could not be completed until some time in mid-June 1986, after the appellant's brief was due. The reporter estimated the cost of preparing the transcripts at approximately $500 and that she would need that "up front" before beginning transcription. Appellant could not afford this amount of money and requested that the reporter accept a partial payment with arrangements for payment of the balance, which was unsatisfactory. Consequently, the transcripts were never duplicated from the stenographic transcriptions.

Appellant contends that he should have been furnished with a transcript of evidence or an adequate substitute of a transcript, in order to insure that he receive meaningful

appellate review of his claim. It is well established by decisions of the Supreme Court that once a state or the federal government establishes avenues of appellate review, these must be kept free of unreasoned distinctions based on economic status, which can only impede open and equal access to the courts. Burns v. Ohio, 360 US 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959), Rinaldi v. Yeager, 384 US 305, 86 S. Ct. 1497, 16 L.Ed.2d 577 (1966); and Mayer v. Chicago 404 US 189, 92 S. Ct. 410, 30 L.Ed.2d 372 (1971). Applying this rationale, the appellant should have been furnished a record of "sufficient completeness" which would have allowed his discrimination claim to have been reviewed on appeal. A civil

plaintiff who is unable to afford the cost of a transcript of evidence necessary for review on appeal should be afforded the same opportunity a criminal indigent regarding the obtaining of a transcript at governmental expense.

The district court erred in applying a 12-month statute of limitations with respect to appellants non-Title VII claims (42 U.S.C. 1981,1983,1985) against Dekalb County.

In dismissing appellants non-Title VII claims the district court held that OCGA section 36-11-1 (12 month statute of limitations) applied and not the twenty/two year statute codified at OCGA 9-3-22. The Reconstruction Civil Rights Acts do not contain a specific statute of

limitations governing 42 U.S.C. section 1983 actions-" a void which is commonplace in federal statutory law" Board of Regents v. Tomanio, 446 U.S. 478, 483, 100 S.Ct. 1790,1794, 64 L.Ed.2d 440 (1980). While Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so. Wilson v. Garcia 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985).

The case of Wilson v. Garcia has simplified the problem of selecting the appropriate statute of limitation in section 1983 actions. Courts no longer need to select the proper limitations statute for each individual section 1983 claim;

rather, in each state the courts must select one appropriate limitations period for all section 1983 claims, 105 S. Ct. at 1945. Wilson v. Garcia held that section 1983 claims are best characterized as personal injury actions and therefore each state should apply their statute of limitations period governing personal injury actions. After Wilson v. Garcia, in Georgia, the proper limitations period for all section 1983 claims is the two year period set forth in O.C.G.A. section 9-3-33 for personal injuries. Consequently, in the instant action, the appellants non-Title VII claims clearly would be barred by O.C.G.A. section 9-3-33.

The case of Williams v. City of Atlanta, 794 F.2d 624 (11th cir., 1986) discusses whether the ruling in

Wilson should be applied retroactively. Citing Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 355, (1971) the Supreme Court articulated a three-part test to determine whether a rule of law announced in a judicial decision should be retroactively applied: first, the decision to be applied non-retroactively must establish a new principal of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

The law in Georgia before the ruling in Wilson was clear that an employment discrimination claim brought under section 1983 is governed by the limitations in

O.C.G.A. 9-3-22. Although the personal injury statute (9-3-33) was uniformly applied in cases involving wrongful arrest or challenges to detention, in section 1983 cases involving claims of employment discrimination, this court refused to apply the personal injury statute and instead adopted O.C.G.A. section 9-3-22, Georgia's statute for enforcement of statutory rights and recovery of back pay and wages. Under that statute, section 1983 plaintiffs had two years in which to file a claim for back pay, but twenty years to file for injunctive relief. See, e.g., Whatley v. Department of Education, 673 F. 2d 873 (5th cir. 1982),; Howard v. Roadway Express, 726 F.2d 1529 (11th cir. 1984); Solomon v. Hardison, 746 F.2d 699

(11th cir. 1984).

The Whatley court held that section 9-3-22 governs an employment discrimination claim brought under section 1983. The court stated, "we are bound by our holdings in United States v. Georgia Power Company., 474 F.2d 906 (5th cir., 1973) and Franks v. Bowman Transportation Company., 495 F.2d 398 (5th cir.,1974),reversed on other grounds, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) that employment discrimination is a liability created by statute and therefore governed by O.C.G.A. section 9-3-22. This conclusion has been accepted by the district courts in Georgia and has apparently been endorsed by the Georgia Court of Appeals...we therefore, hold that an employment discrimination claim

brought under section 1983 is governed by the limitations in 9-3-22." Whatley, at 878.

This circuit has, thus, firmly held that in employment discrimination suits, the federal court should apply the Georgia twenty/two year period of limitations set forth in section 9-3-22." The overwhelming majority of reported decisions of the federal district courts following Franks and Georgia Power hold that 9-3-22 applies, in a bifurcated manner, to employment discrimination claims under section 1981 and Title VII. id at 875.

In applying the above Georgia law with respect to the limitation period applicable to employment discrimination cases, Wilson v. Garcia did in fact overrule "clear

past Georgia precedent" and therefore appellant contends that the Wilson case should not be applied retroactively and the district court should have applied O.C.G.A. section 9-3-22, Georgia's twenty year statute for enforcement of statutory rights. Based on the reasoning above, it would be unfair to apply the new ruling in Wilson v.Garcia .

Under the Doctrine of Equitable Tolling the district court should have tolled the running of the applicable statute of limitations with respect to the non-Title VII claims because appellant was a member of a pending class action against Dekalb County.

Appellant relies on the cases of American Pipe and Construction Company, et al v. State of Utah, 414

U.S. 538, 94 S. Ct. 756, 38 L.Ed.2d 713 (1974) and Crown, Cork and Seal Company v. Parker, 462 U.S. 345, 103 S. Ct. 2392, 76 L.Ed. 2d 628 (1983). American Pipe was a federal anti-trust suit brought by the state of Utah on behalf of itself and a class of other public bodies and agencies. The suit was filed with only 11 days left to run on the applicable statute of limitations. The district court eventually ruled that the suit could not proceed as a class action, and 8 days after this ruling a number of putative class members moved to intervene. This court ruled that the motions were not time-barred. The court reasoned that unless the filing of a class action tolled the statute of limitations, potential class members would be induced to file

motions to intervene or to join in order to protect themselves against the possibility that certification would be denied, American Pipe. at 553, 94 S.Ct. at 766. The principal purposes of the class action procedure-promotion of efficiency and economy of litigation-would thereby be frustrated. Ibid.

To protect the policies behind the class-action procedure, the court held that "the commencement of a class-action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." Id., at 554, 94 S.Ct.,at 766. In Crown, Cork and Seal Company, the court stated that while American Pipe concerned only intervenors, we

conclude that the holding of that case is not to be read so narrowly. The filing of a class-action tolls the statute of limitations "as to all asserted members of the class". Crown,Cork and Seal Company,Inc. v. Parker, 103 S.Ct. 2392, 2396 (1983)

Crown, Cork and Seal Company, Inc. is a case similar to the instant action. There, respondent, a negro male, after being discharged by a petitioner employer in 1977, filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), which, upon finding no reasonable cause to believe the charge was true, sent respondent a notice of right to sue pursuant to section 706 (F) of Title VII of the Civil Rights Act of 1964. Previously, while respondents charge was still

pending before the EEOC, two other negro males previously employed by petitioner had filed a class-action against petitioner in federal district court, alleging employment discrimination and purporting to represent a class of which respondent was a member. It was not until almost two years after receiving his notice of right to sue that respondent filed an action under Title VII against petitioner in federal district court, alleging that his discharge was racially motivated. In the instant action appellant Rhodes did not receive his notice of right to sue until after three years of filing his claim with the EEOC. Nevertheless, the court in Crown, Cork and Seal relying on the rule in American Pipe held that the filing of the class

action tolled the class action for the respondent and other members of the putative class.

The appellant is aware of the ruling in Johnson v. Railway Express Company, Inc. 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed. 2d 295, (1975) which held that the filing of a Title VII charge with the Equal Employment Opportunity Commission (EEOC) does not toll the applicable statute of limitations with respect to non-Title VII claims (i.e. sections 1981, 1983, 1985.) The issue in Johnson was whether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC), pursuant to section 706 of Title VII of the Civil Rights Act of 1964, 78 STAT. 259.,42 U.S.C. section 2000(e)-5, tolls the

running of the period of limitation applicable to an action based on the same facts, instituted under 42 U.S.C. section 1981. The court in Johnson concluded generally that the remedies available under Title VII and under section 1981, although related, and directed to most of the same ends, are separate, distinct, and independent. Applying this reasoning, the court failed to toll the statute.

In comparing these three Supreme Court cases,(American Pipe, Crown Cork and Seal, and Johnson), there appears to be a conflict with regard to the importance of the federal policys of conciliation and the avoidance of unnecessary litigation. It is well settled that when federal courts sit to enforce federal rights,

they have an obligation to apply federal equity principals. See Dissent, Justice Marshall, with whom Mr. Justice Douglas and Mr. Justice Brennan join, dissenting in part 95 S.Ct. at 1725.

In his dissent in Johnson v. Railway Express , Justice Marshall stated, "In my judgement, following the anti-tolling position of the court produces an inequitable result. Aggrieved employees will be forced into simultaneously prosecuting premature section 1981 actions in the federal courts. Furthermore, full compliance with a short statute of limitations during the pendency of a charge before the EEOC would discourage and/or frustrate recourse to the congressionally favored policy of

conciliation. A federal policy in favor of continuing availability of multiple remedies for persons subject to employment discrimination is inconsistent with the majority's decision in Johnson not to suspend the operation of the statute. Adoption of the tolling theory avoids the Draconian choice of losing the benefits of conciliation or giving up the right to sue, yet preserves the independent nature of the section 1981 action."id, 95 S.Ct. at 1726.

The purpose of a class-action is to avoid a multiplicity of suits. Under the district court's holding in the instant action, the appellant would have had to file a separate non-Title VII action against the defendant while still a member of a pending class-action, of which he was

a certified member. See Winkler v. County of Dekalb, 648 F.2d 411 (1981) This contravenes the federal policy of conciliation and of avoiding multiplicity of lawsuits. Applying this rationale to the instant action, the district court should have tolled the period for the running of the statute of limitation and allowed him to pursue his non-Title VII actions against the defendant.

The District Court erred in dismissing appellant's Title VII claim for failure to establish a prima facie case.

The District Court entered its order dismissing appellant's case for failure to make a prima facie case on September 23, 1985. (R-28) The trial court enunciated its response on pages 2-7 of the trial transcripts

(See record on appeal volume III of 3).

The elements of a disparate treatment claim have been established by McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 688 (1973) and by Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981). The Supreme Court has established a "not inflexible" model for establishing a prima facie case of discrimination." The plaintiff must show: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to

seek applicants from persons of complainant's qualifications." id. 450 U.S. at 253, 101 S.Ct. at 1093.

In the instant action the appellant is black. He had an average academic score of 36.6 on March 12, 1979. The evidence reveals that appellant was kept under oppressive surveillance after he was reinstated by the EEOC. He established that he met the minimum requirements for the job of Police Officer I; that he was suspended for being tardy and charged with being A.W.O.L. on his first day back to work, July 24, 1979, while other employees who had not filed charges of discrimination and were tardy on more than one occasion had not been suspended.

The reasons stated for

appellant's discharge was failure to pass the Firearms exam. A white male member of the Thirteenth Academy Class graduated on May 18, 1979 with a firearms score of 68.9, which was below the passing score (R-17). It is interesting to note that nine weeks remained for firearms instruction, that appellant was enrolled late and that the other recruits had considerably more practice with firearms than did appellant.

The evidence is abound with incidents of intentional discrimination by the defendants. Disparate treatment is the most easily understood type of discrimination. The employer simply treats some people less favorable than others because of their race, color, ... Proof of discriminatory

motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36, 97 S.Ct. 1843, 1854-55, 52 L.Ed.2d 396 (1977).

In the instant action, when appellant was reinstated after the initial E.E.O.C. proceedings, he was "targeted" by appellees through a systematic scheme of "trumping up" charges and giving orders that were difficult to comply with in order to "build a case" against him, (e.g. ordering the appellant to register a car of which he was not the owner.) Capt. McCart took his gun away so he could not practice at the shooting range. While the other recruits went out on the street, appellant was

forced to stay at the academy and fetch donuts for his superiors. Furthermore, after appellant was reinstated he was forced to take all of his courses over again...even the ones he had passed. The other recruits who failed numerous tests were graduated from the academy without having to retake any tests.

Appellant contends he has made out a prima facie case and should be allowed the opportunity to demonstrate a showing of pretext as outlined in McDonnell Douglas. There the court stated, "other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment, and petitioner's general policy and practice with respect to minority

employment. Id. 935 S.Ct. at 1825. Clearly, the appellant was the victim of disparate treatment and intentional discrimination which may be inferred from the evidence.

Conclusion

Appellant's discharge in violation of a Temporary Restraining Order subjects this case for remand.

In Association of Law Enforcement Officers of Dekalb County v. Dekalb County, Ga. (1979), of which appellant was a class member, Judge Wendell Edenfield issued a Temporary Restraining Order on January 9, 1980 preventing Dekalb County from dismissing, suspending, or demoting any person who is a class member in the above action. The facts reveal that the appellant was discharged in direct violation of the

Restraining Order and is entitled to re-instatement. Said discharge is in and of itself grounds for remand.

Appendix I

Constitution, Statutes, Rules, etc.

42 U.S.C. 1981

1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 1983

1983. Civil action for deprivation of rights

Every person who, under color of

any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. 1985 in pertinent part:

1985 Conspiracy to interfere with civil rights-preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or

holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his propety so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. 2000(e)-2 in pertinent part

2000e-2 Unlawful employment practices-employer practices

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sec, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national

origin.

42 U.S.C. 2000e-3 in pertinent part,

2000e-3. Other unlawful employment practices- discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual , or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice

made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Amendment V to U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence t twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV to the U.S. Constitution- in pertinent part:
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. 9-3-22

All actions for the enforcement of rights accruing to individuals under statutes or acts of incorporation or by operation of law shall be brought within 20 years after the right of action has accrued; provided, however, that all actions for the recovery of wages, overtime, or damages and penalties accruing under laws respecting the payment of wages and overtime shall be brought within two years after the right of action has accrued.

O.C.G.A. 9-3-33

Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year after the right of

action accrues.

Dekalb County Code 2-3437

A permanent employee who is dismissed, suspended or demoted shall have the right to appeal to the council not later than 10 days after the effective date of the dismissal, suspension or demotion. This appeal shall be in writing and transmitted to the director, who shall arrange a formal hearing before the council at the next regular monthly meeting or within 30 days after receipt of the appeal.

O.C.G.A. 36-11-1 in pertinent part:

All claims against counties must be presented within 12 months after they accrue or become payable or the same are barred.

Appendix 2

Eleventh Circuit Court of Appeals

No. 85-8801

Elliott F. Rhodes,

Plaintiff-Appellant

versus

Dekalb County, Georgia

Defendants-Appellees

Appeal from the U.S. District Court

for the Northern District of Ga.

November 19, 1986

Before GODBOLD, VANCE, AND JOHNSON,

circuit judges.

PER CURIAM:

This is an appeal from a summary judgement in favor of defendants in an action brought under 31 U.S.C. section 6721 (the Revenue Sharing Act) and 42 U.S.C. sections 1981, 1983, and 1985, and from an involuntary dismissal, pursuant to Rule 41(b), Fed. R. Civ. P., of a Title VII claim. Plaintiff brought suit against his former employer, DeKalb County, Georgia, Captain E.E. McCart of the Dekalb County Bureau of Police Services, and the Dekalb County Merit System Council. Plaintiff alleged, inter alia, that he was discharged because of his race and in retaliation for filing a previous charge of discrimination with the Equal Employment Opportunity Commission (EEOC). The defendant answered, inter alia, that the

complaint was barred by applicable statutes of limitations and filed a motion for summary judgement with supporting affidavits.

Upon review of all the pleadings and supporting affidavits, the district court granted partial summary judgement, dismissing all defendants except Dekalb County and all claims except those brought under Title VII. The Title VII matter was then tried by the court sitting without a jury. The court granted Dekalb County's motion for involuntary dismissal, holding that plaintiff failed to establish a prima facie case of discrimination.

Plaintiff contends that the district court erred in granting summary judgement for defendant McCart because a genuine issue of disputed fact existed as to McCart's

involvement in plaintiff's discharge--whether plaintiff had informed McCart that plaintiff would be late for work one day. Plaintiff had no claim against McCart under Title VII because McCart was not plaintiff's employer. Johnson v. Richmond County, 507 F.Supp. 993, 995 (S.D. Ga. 1981) vacated in part on other grounds, No. 83-8224 (April 16, 1984) (unpublished opinion); see Allen v. Lovejoy, 553 F.2d 522, 525 (6th Cir. 1977). For the same reason plaintiff did not have a claim against McCart under the Revenue Sharing Act. See 31 U.S.C. 6716(a), (b).

Plaintiff's only claims against McCart were brought under 42 U.S.C. 1981, 1983, and 1985. The district court found that these causes of action were barred by the Georgia statute of limitations, O.C.G.A. 9-

3-22, which provides for a two-year limitations period on claims for damages. Since 1983 actions are considered personal injury actions for statute of limitations purposes, Wilson v. Garcia, 471 U.S. 261 (1985), the district court should have applied the Georgia personal injury limitations period codified at O.C.G.A. 9-3-33 (1982). Williams v. City of Atlanta, 794 F.2d 624 (11th Cir. 1986). The district court should have likewise applied O.C.G.A. 9-3-33 to the 1981 and 1985 claims. See id. at 625, n.1 (by implication). Georgia Code section 9-3-33, however, also provides for a two-year limitations period. The plaintiff filed the present action more than three years after the claims arose, and the lower court's error was therefore without effect.

Since the statute of limitations barred plaintiff's only legally cognizable claims against McCart, no genuine issue of disputed fact remained, and summary judgement was proper.

Plaintiff next contends that the district court erred when it held that O.C.G.A. 36-11-1, the Georgia twelve-month statute of limitations on actions against counties, barred his non-Title VII claims against Dekalb County. Plaintiff argues that the court should have applied the statute of limitations found at O.C.G.A. 9-3-22. In support of this argument plaintiff cites Solomon v. Hardison, 746 F.2d 699, 705 (11th Cir. 1984) and Whatley v. Department of Education, 673 F. 2d 873, 878 (5th Cir. 1982). These cases are inapplicable, however, because they

did not involve 1983 actions against counties. If, as plaintiff argues, the statute of limitations on actions against counties is not applicable, Wilson v. Garcia, 471 U.S. 261, requires application of the personal injury limitations period. Plaintiff does not argue that the district court erred in applying O.C.G.A. section 9-3-22 to his purported Revenue Sharing Act claim.

Plaintiff contends that because he was a member of two pending Title VII class actions against Dekalb County, these pending claims should have tolled the relevant statute of limitations on his non-Title VII claims. This court held, in a similar case arising in Georgia, that pending Title VII actions do not toll the statute of limitations on 1981 claims. Howard v. Roadway Express

Inc., 726 F.2d 1529, n.1 (11th Cir. 1984). The court in Howard was following the Supreme Court decision in Johnson v. Railway Express Agency, 421 U.S. 454, which similarly held that pending Title VII actions did not toll the applicable statute of limitations on section 1981 actions brought in Tennessee. Plaintiff fails to direct this court to any Georgia statute or case dictating that pending Title VII actions toll the statute of limitations on non-Title VII claims. Thus we hold that the statute of limitations was not tolled. See Board of Regents v. Tomanio, 446 U.S. 478, 485-86 (1980) (state law controls tolling of state statute of limitations in section 1983 cases).

Plaintiff contends that the district court erred in holding that

he failed to establish a prima facie case of discrimination under Title VII. Plaintiff had failed, however, to provide a transcript of the evidence on which the district court made its findings. Since this court does not have a complete record of the trial proceedings, we are not able to review this contention and must affirm the district court decision. United States v. Dallas County Commission, 739 F. 2d 1529, 1540 (11th Cir. 1984).

AFFIRMED